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No. 83-1496

In the Supreme Court of the United States

OCTOBER TERM, 1983

SHIPPERS NATIONAL FREIGHT CLAIM COUNCIL, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHN BROADLEY
General Counsel

LAWRENCE H. RICHMOND
Deputy Associate General Counsel

EVELYN G. KITAY
Attorney
Interstate Commerce Commission
Washington, D.C. 20430

QUESTIONS PRESENTED

Whether the court of appeals correctly sustained the Interstate Commerce Commission's interpretation of the Interstate Commerce Act (49 U.S.C. (Supp. V) 10730) as authorizing the Commission to approve rates limiting the liability of carriers for loss or damage (commonly known as "released rates") by providing for a "deductible" that bars carrier liability for loss or damage that falls below a specified dollar amount.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A38) is reported at 712 F.2d 740. The decisions of the Interstate Commerce Commission (Pet. App. B1-B4, C1-C2, D1, E1-E4) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1983. A petition for rehearing was denied on December 12, 1983 (Pet. App. F1-F2). The petition for a writ of certiorari was filed on March

9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the common law, a carrier's potential liability for loss or damage to goods entrusted to it for carriage was virtually unlimited. Nevertheless, the common law did permit agreements between shippers and carriers that limited the carrier's liability, and since 1916, the Interstate Commerce Act (49 U.S.C. (Supp. V) 10101 *et seq.*) also has permitted regulated carriers to limit their liability for loss or damage. Rates embodying such a limitation on the carrier's liability are known as "released rates" or "released value rates." In *Hart* v. *Pennsylvania R.R.*, 112 U.S. 331, 343 (1884), this Court explained that the acceptance of released rates is based on estoppel:

> [W]here a contract [of carriage], signed by the shipper, is fairly made, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives * * *.

As Congress has recently reaffirmed in amending the governing Section of the Interstate Commerce Act (49 U.S.C. (Supp. V) 10730), released rates are beneficial because they reduce rates and increase the range of choices available to the shipping public:

> With a full value rate, a shipper pays one price for two distinct services which are tied together,

> the actual line-haul of a commodity from one point to another and full insurance on the commodity on that movement. Released rates, in effect, allow the shipper to pay a lesser price for hauling the goods and a separate agreed-upon price for whatever amount of insurance the shipper desires.

H.R. Rep. 96-1069, 96th Cong. 2d Sess. 25-26 (1980). See also H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 102 (1980). This case involves the question whether 49 U.S.C. (Supp. V) 10730(a) and (b)—which permit "released rates" generally [1]—authorize the Interstate Commerce Commission to approve a particular type of released rate for motor carriers: those with "deductibles," which are provisions (like those in many insurance contracts) excluding liability for loss or damage that falls below a specified dollar value.

2. Carriers traditionally have chosen to limit their liability by specifying a maximum dollar value per

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[1] The released rate provision originally was part of 49 U.S.C. 20(11), which stated that carriers may be authorized "by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property." When the Interstate Commerce Act was recodified without substantive change in 1978 (see *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 319 n. 7 (1981)), the released rate provision was carried forward in Section 10730, which provided:

> The Interstate Commerce Commission may require or authorize a carrier * * * to establish rates * * * limited to a value established by written declaration of the shipper, or by a written agreement, when that value would be reasonable under the circumstances surrounding the transportation.

49 U.S.C. (Supp. V) 10730(a).

unit of weight of the cargo (*e.g.*, $1.00 per pound); they have not in the past used deductibles. However, in 1980, the Commission, following a hearing, approved a freight forwarder's application to publish three levels of rates, two of which provided for deductibles.[2] Petitioners sought judicial review of that approval, but in 1981 they agreed to remove the action from the active docket of the court of appeals while they sought a legislative change from Congress or a declaratory order from the Commission on the validity of deductibles. Pet. App. A8, A10 n.4, E1.

In March 1982, the Commission issued the requested declaratory order construing 49 U.S.C. (Supp. V) 10730, as amended by the various transportation acts passed in 1980 (Pet. App. E1-E4).[3] Consistent

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[2] *Interstate International Inc. Used Household Goods* (ICC Released Rates Dec. No. FF-303), reproduced at Pet. App. B2-B4, C1-C2, D1.

[3] For an extensive discussion of the 1980 amendments, see Pet. App. A2-A6. Briefly, Congress enacted three separate Acts related to transportation in that year: the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.* (July 1, 1980); the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 *et seq.* (Oct. 14, 1980); and the Household Goods Transportation Act of 1980, Pub. L. No. 96-454, 94 Stat. 2011 *et seq.* (Oct. 15, 1980).

Section 12 of the Motor Carrier Act (94 Stat. 802) divided Section 10730 into subsections (a) and (b). Section 10730 (b) (1) provides that a motor carrier of property may—

> establish rates * * * under which the liability of the carrier * * * is limited to a value established by written declaration * * * if that value would be reasonable under the circumstances * * *.

Section 10730(a), which applies only to carriers of household goods, is identical to subsection (b), except that rates promulgated under subsection (a) require prior ICC approval. Subsection (b) rates, like other tariff publications, are subject

with its prior approval of the freight forwarder deductibles in the 1980 proceeding, noted above, the Commission announced that motor carriers, as well as rail carriers,[4] may file rates with deductibles. The Commission explained that Sections 10730(a) and (b) give it broad discretion to approve released rates and do not limit the kind of value limitation that may be approved, and that a decision to allow deductibles is consistent with the policy of the Household Goods Transportation and Motor Carrier Acts of 1980 (see note 3, *supra*) to allow a variety of quality and price options to meet market demands (Pet. App. E3-E4). The Commission also pointed out that deductibles have the same effect as more traditional forms of released rates because they too limit the carrier's maximum liability to an amount less than the shipment's actual value (*ibid.*).

3. The court of appeals affirmed the Commission's interpretation in all respects (Pet. App. A1-A38). In so doing, the court rejected petitioners' claim that the common law prohibited deductibles (Pet. App. A11-A18). It also rejected petitioners' various arguments that Section 10730 precludes non-rail carriers from using that form of liability limitation. The court first determined (Pet. App. A16-A19) that the Com-

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to protest or complaint alleging discrimination or unreasonableness. 49 U.S.C. (Supp. V) 10708, 10741.

Subsection (c) was added to Section 10730 by the Staggers Rail Act. It provides that rail carriers may limit their liability to a value established by written declaration or agreement and states that shippers and carriers may provide for deductibles.

[4] As explained above (see note 3, *supra*), only subsection (c) of 49 U.S.C. (Supp. V) 10730, added by the Staggers Rail Act, expressly refers to deductibles.

mission could have permitted deductibles prior to enactment of the three 1980 Acts that amended Section 10730, because Congress, since 1916, has entrusted "the approval of transportation rates limiting carrier liability to the Commission without any statutory directive confining it to specific types of limited-liability arrangements" (Pet. App. A19). The court then reasoned (Pet. App. A20-A25) that the three 1980 Acts had not divested the Commission of the power to permit deductibles. If anything, the court found (Pet. App. A20-A21), the legislative history of the Motor Carrier Act of 1980 affirmatively suggests that deductibles are fully consistent with the statutory scheme, because Congress envisioned that a variety of released rates would enhance price competition and reduce rates. Indeed, after noting that Congress had viewed a variety of released rates as essentially the equivalent of affording a shipper a variety of options with respect to the amount of insurance coverage it wants for its goods—and that Congress had intended that the shipper even could have the option to forgo coverage entirely if the goods are of low value or the shipper wants to assume the risk of loss (H.R. Rep. 96-1069, *supra*, at 26)[5]—the court concluded (Pet. App. A21):

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[5] As the court of appeals stated, the conference report provides:

> Released rates, in effect, allow the shipper to pay a lesser price for hauling the goods and a separate agreed-upon price for whatever amount of insurance the shipper desires. Consequently, if the commodities are of low value or if the shipper wants to take the risk, the shipper may want only partial insurance or *none at all.*

Pet. App. A21 (emphasis added by the court) (quoting H.R. Rep. 96-1069, *supra*, at 25-26).

> [W]hile the crux of petitioners' complaint is that the practical effect of a deductible for property of low value is to deprive the shipper of any recovery, this appears to be precisely one of the options Congress sought, in the Motor Carrier Act, to have available.

The court went on to observe that nothing in the subsequent Staggers Rail Act, with its express recognition that rail carriers may provide for deductibles in their released rate, suggests that Congress believed it was either taking away an existing option for other carriers not covered by the Staggers Rail Act or creating a new option for the rail carriers subject to that Act (Pet. App. A21-A23). To the contrary, the court again found evidence that Congress believed that deductibles already were authorized for rail carriers even without the explicit authorization (Pet. App. A22).[6]

ARGUMENT

The thorough opinion of the court of appeals correctly affirmed the Interstate Commerce Commission's interpretation of its responsibilities under the carrier liability Section of the Interstate Commerce Act it administers. The holding does not conflict with any decision of this Court or of any other court of appeals. Moreover, petitioners have failed to show that their interests cannot adequately be protected by their right to challenge the reasonableness of particular deductibles, to purchase additional insurance, or to choose a carrier that does not use deductibles. This case therefore presents no issue of general importance warranting the Court's attention.

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[6] Judge Pratt dissented (Pet. App. A25-A38), expressing the view that "deductibles" are not authorized by Section 10730.

1.a. Petitioners principally contend (Pet. 6-21) that motor carrier deductibles are illegal because such deductibles always were prohibited by statute and that nothing in the three 1980 Acts removed such a prohibition. This contention in turn rests upon petitioners' repeated assertion (Pet. 8, 9, 11, 13, 15) that deductibles are fundamentally different from and inconsistent with traditional released rates. The court of appeals properly rejected petitioners' attempt to create a fundamental difference where none exists.

Petitioners concede (Pet. 9) that the court of appeals accurately identified the rationale for approving a liability limitation when it stated that the carrier is "entitled to know the extent of its potential liability" (Pet. App. A12). The court continued (*ibid.* (emphasis added)):

> Hence the contractual limitation on the carrier's liability was viewed not as the carrier's attempt to exonerate itself from losses negligently caused by it, but rather as the agreement of carrier and shipper in advance on the *maximum* compensation the shipper would recover should the property be lost or damaged, with the freight rate keyed to the size of the carrier's risk.

Accordingly, petitioners essentially agree with the court of appeals that what makes a traditional released rate agreement lawful is that it "alert[s] the carrier to his *maximum* exposure to liability and the level of care called for" (Pet. 11 (emphasis in original)). Petitioners maintain, however, that the court of appeals erroneously equated deductibles and traditional released rates because, in petitioners' view, a deductible "tells the carrier *nothing* about the

'extent of the carrier's potential liability', or the 'maximum compensation the shipper would recover' " (Pet. 9 (emphasis in original), quoting the opinion of the court of appeals at Pet. App. A12) (emphasis by petitioners)). Notwithstanding petitioners' vigorous repetition of this argument, it is plainly wrong.

As the court of appeals correctly reasoned (Pet. App. A14), there is no fundamental difference between a deductible and a traditional released rate, because a deductible in fact does determine the maximum extent of a carrier's liability and the maximum compensation a shipper would receive in the event of loss or damage. On a shipment whose actual value is $1000, for example, if the shipper releases the value to $500, the carrier knows it will never have to pay more than $500 if the shipment is lost and the shipper knows it can never recover more than the agreed-upon $500. Obviously, if the actual loss turns out to be less than $500, the carrier's liability would be less than the maximum; but if the shipper's actual loss exceeds $500, a portion of that loss will be uncompensated. In either event, however, the released rate establishes the carrier's *maximum* liability, and thereby permits the carrier to gauge its risk and to set its rates accordingly. A deductible accomplishes these same purposes. For example, a $50 deductible on a $1000 shipment will precisely establish the carrier's maximum liability at $950 (the full value of the shipment less the amount of the deductible). Thus, if one accepts petitioners' proposition that released rates generally are lawful because they establish maximum carrier liability, it necessarily follows that deductibles are an acceptable feature of such rates.[7]

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[7] The court of appeals correctly rejected petitioners' argument (Pet. 9, 13, 15) that the statute permits only the tradi-

Petitioners nevertheless contend (Pet. 8, 22-24) that deductibles can never be allowed because in some cases the value of the shipment may fall below the amount of the deductible. The court of appeals correctly rejected this argument, holding that what determines the lawfulness of any arrangement limiting liability is the reasonableness of a lower transportation charge reflecting known risk, coupled with an opportunity to pay a higher reasonable charge for more complete coverage (Pet. App. A14-A15). If these elements are present, the rationale for limitation of liability is satisfied, and it is beside the point that in some instances under the contract to which the shipper has agreed, the carrier might not pay for a particular item of loss or damage. The fact that the size of the uncompensated loss may vary depending upon whether a shipper selects a traditional released rate or a deductible is relevant only to the shipper's decision to accept or reject a particular liability limitation; it does not mean that deductibles cannot even be offered.[8]

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tional form of released rates because Section 10730 refers to "value" and a deductible does not, in petitioners' view, result in an agreed-upon "value" (Pet. App. A19 n.8). The "value" mentioned in the statute, however, is simply the maximum compensation to which the parties have stipulated in the event of loss; it need not reflect the actual worth of the goods for other purposes. Deductibles and released rates are simply different ways of arriving at and expressing an agreed-upon level of maximum compensation.

[8] Moreover, Congress itself clearly views deductibles as a form of released rates. Section 10730(c) provides in pertinent part (emphasis added):

> A rail carrier * * * may establish rates * * * under which the liability of the carrier * * is limited to a value established by written declaration of the shipper or by a

b. The court of appeals also correctly concluded that the three 1980 Acts did not impose a new prohibition against deductibles that did not exist under the Interstate Commerce Act prior to 1980. Pet. App. A20-A25. Petitioners' principal argument to the contrary (Pet. 6, 16-21) is that because subsection (c) of Section 10730 expressly allows rail carriers to establish deductibles, the Commission had no authority to permit motor carriers to establish deductibles under subsections (a) and (b), which do not expressly mention deductibles. Petitioners' theory, however, ignores this Court's teaching that the reference in one Section of the Interstate Commerce Act to a particular power of the Commission does not justify a "vast leap from a particular authorization to a pervasive prohibition." *American Trucking Associations* v. *Atchison, T. & S.F. R.R.*, 387 U.S. 397, 411 (1967). See Pet. App. A25, E3.[9] It also ignores the well estab-

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written agreement between the shipper and the carrier, *and may provide in such written declaration or agreement for specified* amounts to be deducted from any claim.

The conference report on this provision explains that "[t]he ability to use released rates *including the deductible* in an agreement, gives both the shipper and carrier greater flexibility" (H.R. Conf. Rep. 96-1430, *supra*, at 102 (emphasis added)).

[9] Contrary to petitioners' assertion (Pet. 17), the reasoning of *American Trucking Associations* is directly applicable here. Section 10730, as it reads today, is the product of three different statutes—the Motor Carrier Act, the Household Goods Transportation Act, and the Staggers Rail Act—passed at different times and (as petitioners concede (Pet. 19)) for different reasons. See Pet. App. A3-A5. As the court of appeals observed (*id.* at A22-A23, A25), rail carriers sought express assurance that deductibles are lawful in the Staggers Rail Act, but motor carriers did not seek similar assurance in the other legislation. Moreover, there is nothing to suggest that Congress viewed deductibles as a newly available option

lished principle that the ' "construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.' " *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 598 (1981) (quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969)). See also *National Association of Greeting Card Publishers* v. *USPS*, No. 81-1304 (June 22, 1983), slip op. 9-10. There are no such indications here.

In language that has been essentially the same since 1916, Congress authorized the Commission to permit rates under which the carrier's liability is limited to a "value" established by written declaration or written agreement "when that value would be reasonable under the circumstances surrounding the transportation" (49 U.S.C. (Supp. V) 10730(a)). As the lower courts have recognized, this statutory language gives the Commission broad discretion to permit any type of released value provision, "so long as it finds the rates that are based on that provision to be 'just and reasonable under the circumstances and conditions surrounding the transportation.' " *National Motor Freight Traffic Association* v. *ICC*, 590 F.2d 1180, 1185 (D.C. Cir.), cert. denied, 440 U.S. 959 (1978) (citation omitted); *Household Goods Carriers' Bureau* v. *ICC*, 584 F.2d 437, 440-441 (D.C. Cir. 1978); Pet. App. A16-A18. See also H.R. Rep. 96-1069, *supra*, at 26 (the Commission has complete regulatory authority over released value rates, except as

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when it passed the rail legislation or that it believed it had denied deductibles to carriers other than railroads. See Pet. App. A21-A22, A23-A25. In these circumstances, petitioners' contention that the Court should read a prohibition against deductibles into Section 10730(a) and (b) simply because Congress specifically authorized their use by rail carriers under separate legislation must fail.

provided otherwise). Because Congress has not imposed restrictions on the way in which motor carriers may establish limitations on agreed-upon value—and because petitioners do not and cannot point to any statutory language or judicial decision stating that limitations on liability cannot be achieved through the use of deductibles—the court below properly found that the Commission, both before and after 1980, could permit motor carriers and carriers of household goods to file rates with deductibles.[10]

Finally, as the court of appeals noted (Pet. App. A20-A21), the legislative history and the purposes of the Motor Carrier and Household Goods Transportation Acts generally support the Commission's approval of deductibles. Congress intended in the Household Goods Transportation Act to establish "maximum carrier flexibility in pricing." H.R. Rep.

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[10] There is no basis for petitioners' contention (Pet. 16) that Congress would not have specified that rail carriers may use deductibles if deductibles already were lawful prior to the 1980 Act. Congress described the purpose of the released rate provision in the Staggers Rail Act as follows (H.R. Conf. Rep. 96-1430, *supra*, at 82 (emphasis added)):

> To provide both shippers and railroads with greater rate-service options the Act permits the establishment of lesser liability requirements than presently *assured* by law.

As the court of appeals observed (Pet. App. A24-A25 n.12), the use of deductibles was not "assured" under prior law because *all* released rates then were subject to prior Commission approval, and the Commission had been reluctant to approve any type of released rates for railroads. The court reasoned that if Congress had viewed deductibles as a type of limitation on liability that the Commission could not previously have authorized, "we would have expected the Conference Report to mention deductibles as a feature not then 'available' under the law, rather than simply not 'assured'" (Pet. App. A24-A25).

96-1372, 96th Cong., 2d Sess. 5 (1980). Similarly, the legislative history of the Motor Carrier Act establishes that Congress intended that it would assure a variety of price and liability options to shippers (H.R. Rep. 1069, *supra*, at 3-4, 25-26; see 49 U.S.C. (Supp. V) 10101(a)(4) and (7)(B)) and that the amendments it made to Section 10730 would "foster more competition in the pricing of transportation services" (H.R. Rep. 96-1069, *supra*, at 26). The authorization to use optional deductibles clearly provides shippers with a price option that they otherwise would not have.[11]

In sum, the Commission's decision to permit motor carriers to offer deductibles is consistent with both the language and the purposes of 49 U.S.C. (Supp. V) 10730(a) and (b).

2. In addition to arguing that the Commission is absolutely precluded as a legal matter from authorizing any deductibles for motor carriers under 49 U.S.C. (Supp. V) 10730(a) and (b), petitioners also argue (Pet. 21-26) that deductibles are unwise as a

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[11] Petitioners' assertion (Pet. 18-19) that the decision below conflicts "in principle" with that of the Fifth Circuit in *Global Van Lines, Inc.* v. *ICC*, 714 F.2d 1290 (1983), is entirely without merit. There, the court rejected the contention that an express statutory provision for certain action by the Commission with respect to motor carriers *itself* authorized the Commission to take similar action with respect to freight forwarders. 714 F.2d at 1293-1294. Here, by contrast, the Commission does not contend that the express authorization in Section 10730(c) for the use of deductibles by rail carries also applies of its own force to motor carriers or that the Commission may "extend" that explicit authorization to motor carriers, as petitioners characterize the Commission's actions (Pet. 18-19). Instead, the Commission concluded (and the court of appeals agreed) that the distinct statutory provisions specifically applicable to motor carriers (Sections 10730(a) and (b)) separately authorize the Commission's actions.

matter of public policy. This objection stems from petitioners' view that deductibles will allow a carrier "to completely escape the consequences of its own negligence or misconduct" and will encourage careless handling and minor theft (Pet. 8, 23-24).[12] Petitioners' unsupported speculation does not justify review of the court of appeals' decision. The Commission expressly found that deductibles are not likely to reduce a carrier's interest in the security of the freight it carries (Pet. App. C1), and petitioners have not pointed to any concrete evidence to the contrary. If the use of deductibles should become widespread and if that experience should suggest that the Commission's expert judgment that carriers would continue to exercise concern for the security of their cargoes was incorrect, the Commission retains authority to restrict or prohibit the practice at a later date. Moreover, as the court of appeals correctly held (Pet. App. A14), a deductible cannot be viewed as an exoneration from total liability unless the amount of the loss or damage suffered by the shipper is less than the deductible, and the Commission retains authority over the reasonableness of the amount of the deductible. If circumstances warrant, the Commission could require that deductibles be only relatively small in amount and thus continue to expose the carrier to potential liability for most losses, which in turn

[12] Contrary to petitioners' contention (Pet. 25), it was not "incumbent on the Commission to explain * * * why it thought [deductibles] desirable". The Commission was merely issuing a declaratory order that deductibles are not *per se* unlawful and can be used in the future. The agency thus had before it a question of statutory construction, not one of policy. As petitioners themselves concede (Pet. 25), the Commission explained fully why it thought that Section 10730 permits the filing of deductibles. Nothing more was required.

would further ensure the appropriate level of care by the carriers that petitioners seek. Petitioners' concerns thus go to the reasonableness of any particular deductible, not the Commission's legal authority to permit them at all. The reasonableness of any particular deductible is not an issue here.

In any event, petitioners ignore that deductibles are not mandatory. Shippers who want more protection have the option to choose a carrier that does not use deductibles or to purchase insurance on their shipments, and the Commission may require that the carrier offer a full liability option in addition to a deductible or other released rate. 49 U.S.C. (Supp. V) 10730(b)(2). There is, accordingly, no reason why shippers should be faced with only the choice of using deductibles, as petitioners speculate might occur. See Pet. 6-7, 23, 24-25.

Indeed, although the Commission's declaratory order was issued more than two years ago, petitioners do not assert that carriers today have offered only unreasonable deductible rates. Section 10730 ensures (1) that any released rate must be reasonable; (2) that released rates for household goods must be approved by the Commission prior to their adoption (49 U.S.C. (Supp. V) 10730(a)); and (3) that motor carrier rates are subject to Commission (and, of course, judicial) review thereafter (49 U.S.C. (Supp. V) 10730(b), 10708, 10741). Thus, the reasonableness of individually established rates may be protested, and if a shipper believes that a particular carrier is handling freight negligently, it can choose another carrier or seek administrative or judicial review. Especially in these circircumstances and in the absence of a circuit conflict, the court of appeals' decision that motor and household goods carriers are authorized to use deductibles does not present ques-

tions of broad importance that warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

JOHN BROADLEY
General Counsel

LAWRENCE H. RICHMOND
Deputy Associate General Counsel

EVELYN G. KITAY
Attorney
Interstate Commerce Commission

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